IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARREL MOODY	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
JO ANNE B. BARNHART, Commissioner of Social Security Administration	:	
	:	NO. 02-8972
Defendant.	:	

Newcomer, J. July ,2003

O P I N I O N

Darrel Moody ("Plaintiff") seeks judicial review in this Court, pursuant to 42 U.S.C. §§ 405(g) and 1383(c), of the final decision of the Commissioner of the Social Security Administration denying his claim for disability insurance benefits ("DIB") under Title II of the Social Security Act. The parties have filed cross-motions for summary judgment. For the reasons provided below, Plaintiff's Motion for Summary Judgment is DENIED, Defendant's Motion for Summary Judgment is GRANTED, and judgment is entered in favor of the Defendant.

I. PROCEDURAL HISTORY

On April 2, 2002, Plaintiff as well as various medical and vocational experts testified at an administrative hearing concerning Plaintiff's application for DIB and supplemental

security income ("SSI") filed on July 28, 2000, pursuant to 42 U.S.C. §§ 401-433, 1381-1383(f). On May 20, 2002, an administrative law judge ("ALJ") determined that Plaintiff was not disabled because he could hold and maintain jobs in the national workforce under 20 C.F.R. § 404.1520(f). Plaintiff then appealed the ALJ's decision to the Appeals Council and introduced evidence not originally put forth in the hearing before the ALJ. The Appeals Council found no basis to overturn the ALJ's decision, which then became the final agency judicial decision subject to judicial review. Sims v. Apfel, 530 U.S. 103, 106 (2000).

II. FACTUAL BACKGROUND

A. Personal History.

Plaintiff was born on January 16, 1953, in Brooklyn, New York and moved often as a child (R. 32-33).[1] He completed high school (R. 33) and served in the United States Marine Corps from 1970 to 1974 as an aviation mechanic, receiving an honorable discharge (R. 160-161). Beginning during his service in the Marines, and continuing thereafter, Plaintiff used alcohol excessively and indulged in various illicit drugs (R. 160)[2]. Plaintiff claims to be sober since 1993 (R. 160). Within that

[1]Plaintiff was in a military family (R. 160).

[2]Plaintiff testified to using marijuana, crack cocaine, LSD, opium, and heroin (R. 160).

time span, he received his associates degree in computer sciences (R. 19). In July, 2000, Plaintiff filed for DIB, claiming mental and physical disability beginning April 16, 2000 (R. 94).

B. Work History.

After his honorable discharge, Plaintiff worked as a telephone operator from 1975 to 1976 (R. 142). From 1983 to 1987, he worked as a state store clerk for the Pennsylvania Liquor Control Board (R. 142). Thereafter, he worked as a part-time assistant for the Philadelphia Community College (R. 142). Finally, he worked as a stock clerk at Eckerd Drugs from 1998 until April, 2000 (R. 142).[3]

C. Plaintiff's Physical Impairments.

On April 10, 2000, Plaintiff went to an emergency room complaining of back pain (R. 148). He was given Ibuprofen and Valium and instructed to follow up with his primary care physician, Dr. Antonette Kruc, D.O. (R. 148). Plaintiff consulted Dr. Kruc on April 24, 2000, who prescribed Voltaren, Zydore and Soma to ease his back pain (R. 152).

On May 8, 2000, Plaintiff was given a straight leg-raising test, after which an MRI was ordered (R. 146, 152). The MRI was performed on May 23, 2000, and revealed that Plaintiff had a

[3]There are spans from which Plaintiff did not hold or maintain a job intertwined throughout his active work history (R. 142). Neither Plaintiff's Brief nor the Government's Brief fills in any of these gaps between jobs.

lumbar disc bulge, a herniated lumbosacral disc and a small thoracic disc bulge without stenosis (R. 144). Dr. Kruc prescribed DepoMedrol to be injected in conjunction with the previously prescribed medications (R. 151).

On October 31, 2000, Plaintiff consulted Pushpa Thakarar, M.D., a state agency consulting doctor (R. 165-172). Plaintiff complained of lower back and leg pain, but also reported being able to sit for two hours, walk two to six blocks without assistance, and stand for two hours (R. 166). Dr. Thakarar's report indicated that Plaintiff was limited to standing/walking three to four hours per day, sitting eight hours per day, lifting up to twenty pounds frequently, and that wetness and humidity would aggravate his back pain (R. 172). Dr. Thakarar also reported that Plaintiff's muscle strength ranked 5/5 and that he had full range motion in his arms and legs (R. 167). However, Dr. Thakarar noted limitation in pushing/pulling with his legs (R. 172).

On May 23, 2001,[4] Plaintiff was admitted to the University of Pennsylvania Hospital after complications caused by diabetes (R. 213). There, he tested positive for opiates[5], and was

[4]There are no medical records between October 31, 2000 and May 23, 2001 (Pl. Br. 10).

[5]The results of the opiate test were most likely impacted by the prescription of narcotic pain relievers to Plaintiff (Pl. Br. 11 n. 7).

treated with insulin and medication for a left cerebellar hemorrhagic infarct[6] (R. 213). He was later discharged to a rehabilitation hospital on June 7, 2001, where he stayed until June 23, 2001 (R. 212, 236).

In August, 2001, Plaintiff began treatment with a doctor at Eastwick Primary Care (R. 371-372). He was prescribed Tylenol #3[7] on September 13, 2001 to remedy pain (R. 364). His last recorded physical examination on October 25, 2001, indicates full range motion in his neck and back and normal straight leg-raising (R. 367-368).

D. Plaintiff's Mental Impairments.

On May 5, 2000, Plaintiff consulted Dr. Kruc concerning a custody dispute that affected his sleep patterns (R. 152). On July 27, 2000, Dr. Kruc diagnosed Plaintiff with severe post-traumatic stress and prescribed Zoloft and Xanax for depression and anxiety (R. 151).

On October 25, 2000, Plaintiff met with Charles S. Johnson, Psy.D. for a psychological evaluation (R. 160). Plaintiff reported excessive alcohol use and drug use beginning in the military (R. 160). Dr. Johnson's evaluation concluded that Plaintiff did not suffer from paranoia, showed fair

[6]This term defines a mild stroke.

[7]This is commonly referred to as Tylenol with Codeine (Pl. Br. 11 n. 8).

concentration, and had intact memory and social judgment (R. 161). However, Dr. Johnson also stated that Plaintiff had poor to no ability to interact with supervisors, could not deal with work stresses, could not react predictably in social situations, and could not understand, remember, or carry out complex job instructions (R. 163).

Roger K. Fretz, Ph.D., a state agency psychologist, evaluated Dr. Johnson's conclusions on November 20, 2000 (R. 173). At that time, Dr. Fretz concluded that, while Plaintiff may have some tension with supervisors, he was able to perform simple work (R. 189-190). Dr. Fretz also concluded that Plaintiff had an affective disorder under Listing 12.04[8] and an anxiety-related disorder under Listing 12.06[9], but that these disorders were not severe enough to meet or equal a presumptive disability listing (R. 173).

Plaintiff next received treatment for his mental conditions at The Consortium, a West Philadelphia mental health clinic, in January, 2001 (R. 204). He met with Leon R. Robinson, M.D., concerning depression, anxiety, and rage (R. 204-209). Dr. Robinson diagnosed Plaintiff with a bipolar disorder and avoidant personality disorder (R. 208). Dr. Robinson concluded that

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[8]See 20 C.F.R., Pt. 404, Subpt. P, App. 1.

[9]Id.

Plaintiff was "functioning pretty well"[10] (R. 208).

From January, 2001 through April, 2001, Plaintiff received monthly therapy sessions at The Consortium (R. 199-203). During this time, he was taking Zyprexa, Remeron, Buspar, and Benadryl (R. 203). At latter sessions, Plaintiff reported calmer thoughts (R. 203).

Plaintiff resumed therapy sessions in July, 2001 (R. 202). On September 28, 2001, Plaintiff indicated that, until his pocket was picked, his medications were helping (R. 201). On October 23, 2001, Plaintiff later reported that he cried often for no apparent reason (R. 201). This prompted an increase in his anti-depressant dosage (R. 201). On November 20, 2001, Plaintiff reported he was feeling "good" (R. 200). Thereafter, on January 10, 2002, Plaintiff expressed concern that his anger was getting out of control, but this feeling subsided, as did the crying, as of January 29, 2002 (R. 199).

According to the information presented for the first time at the Appeals council, Plaintiff's feelings of depression, crying, and thoughts of committing crime resumed in April, 2002 and persisted through June, 2002 (R. 431). Finally, on July 30, 2002, Plaintiff reported an increasing need to lash out (R. 430).

E. Medical Expert Testimony.

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[10]Dr. Robinson concluded this by scoring Plaintiff a global assessment of functioning (GAF) score of sixty (R. 208).

Dr. Richard Cohen examined the records and testified at the administrative hearing. Dr. Cohen testified that the record did not support a diagnosis of bipolar disorder (R. 55), major affective disorder (R. 55), or post traumatic stress disorder (R. 56). Dr. Cohen also noted that paranoia was unsupported by the medical testimony (R. 62). Dr. Cohen also determined that Plaintiff had no limitations caused by his mental impairments and that none of Plaintiff's mental impairments were severe (R. 65).

F. Vocational Expert Testimony.

The vocational expert testified that Plaintiff's skills, including data entry and familiarity with the computer, would allow him to perform data entry jobs or customer service jobs (numbering 1,942,000 nationally) (R. 67-68). The expert also noted that Plaintiff's prior work experience supports these findings (R. 66).

III. Discussion

A. Standard of Judicial Review

This Court must determine whether the ALJ's decision is supported by substantial evidence. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1990); Stunkard v. Sec'y of Health and Human Serv., 841 F.2d 57, 59 (3d Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," Richardson v. Perales, 402

U.S. 389, 402 (1971), and is more than a mere scintilla, though it may be less than a preponderance. Stunkard, 841 F.2d at 59. The ALJ must reconcile factual differences in evidence, determine witness credibility, and weigh the evidence presented. Richardson, 402 U.S. at 401.

B. Burden of Proof

To be found "disabled" under the Social Security Act, Plaintiff must demonstrate he is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment...which has lasted or can be expected to last for a continuous period of not less than twelve months." 20 C.F.R. §404.1505(a). Plaintiff may prove this with evidence that the impairment claimed is enough that Plaintiff cannot engage in any "substantial gainful work which exists in the national economy." Heckler v. Campbell, 461 U.S. 458, 460 (1983); Brown v. Bowen, 845 F.2d 1211, 1214 (3d Cir. 1988). If Plaintiff meets this burden, the burden then shifts to the Government to show that work exists in the national economy for which Plaintiff is suited. Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993); 20 C.F.R. § 404.1520(f).

C. Review of the ALJ's Decision

1. The ALJ's conclusion that Plaintiff does not suffer from any severe mental impairment is supported by substantial

evidence.

A plaintiff has the duty to provide all relevant evidence to support his claim in disability actions. Hess v. Secretary of Health Educ. and Welfare, 497 F.2d 837, 840 (3d Cir. 1974) (stating that to force the ALJ to search for all relevant evidence shifts the burden of production to the Government); 20 C.F.R. § 404.1512(a) (noting that plaintiff must bring forward all information showing he is disabled). However, Plaintiff argues that the ALJ is responsible for developing a fair record in the proceedings and cites Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) to support this notion. Plaintiff claims the failure of the ALJ to develop a fair record led to an alleged improper conclusion that he did not have any severe mental impairments (Pl. Br. 23).

Plaintiff incorrectly cites Ventura for the proposition that the ALJ must gather relevant information concerning a plaintiff's disability claim (Pl. Br. 39). Ventura involved a challenge to a biased ALJ who acted improperly by favoring the claimant and her attorney. Ventura, 55 F.3d at 902. Here, Plaintiff does not argue that the ALJ was biased, but rather that the ALJ had the burden of retrieving medical records that pre-dated Plaintiff's claimed date of disability by two years (Pl. Br. 38). Since the burden to provide evidence of disability is on Plaintiff, this argument fails.

Additionally, Plaintiff's argument that the ALJ's failure to recontact Plaintiff's treating psychiatrist prevented a full development of the record is also unpersuasive (Pl. Br. 40). An ALJ must recontact treating physicians only if the record is inadequate to support the ALJ's decision. 20 C.F.R. §404.1512(e); Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002). Since the evidence here was adequate to support the ALJ's decision, Plaintiff's claim that the ALJ erred by failing to secure evidence not presented also fails.

Next, Plaintiff argues that reliance by the ALJ on Dr. Cohen's testimony was in error because Dr. Cohen never examined him (Pl. Br. 32-38). Plaintiff incorrectly assumes the evidence presented was unambiguous. To the contrary, an inspection of the record indicates heavy contradictions in evidence that required reconciliation by the ALJ and justified her consultation of Dr. Cohen. Richardson, 402 U.S. at 408 (noting that an ALJ can consult any doctor to review evidence presented). Dr. Johnson's evaluation of Plaintiff indicates that Plaintiff showed fair concentration, had intact memory and social judgment, and did not suffer from paranoia (R. 161). Dr. Johnson also found, however, that Plaintiff had poor to no ability to interact with supervisors, could not deal with work stresses, could not react predictably in social situations, and could not understand or carry out complex job instructions (R. 163). Contrary to Dr.

Johnson's findings, Dr. Fretz concluded that Plaintiff could carry out simple work instructions and was not presumptively disabled under Listings 12.04 and 12.06 (R. 173, 189-190). Finally, though Dr. Robinson disgnosed Plaintiff with bipolar disorder and avoidant personality disorder, he noted that Plaintiff was functioning relatively well[11] and that medication helped Plaintiff's conditions (R. 208).

To facilitate the resolution of these disparities, the ALJ called on Dr. Cohen to assist her in evaluating the evidence. Richardson, 402 U.S. at 408. Though 20 C.F.R. § 404.1527(d)(2) provides that evidence presented by examining witnesses will be given more weight than that of opinion evidence (the conclusions of a non-examining expert), to require the ALJ to do so here would be nugatory due to the inconsistent reports in evidence. Contrary to Plaintiff's claims, the ALJ did not discard treating and examining physicians' testimony (Pl. Br. 32). Instead, the ALJ consulted Dr. Cohen for clarification of the proffered evidence. By seeking the testimony of Dr. Cohen, the ALJ resolved the differences in evidence. Therefore, after accepting the testimony of the treating and examining physicians and

[11]Plaintiff argues that this score, since it shows moderate signs of mental impairment proves a severe mental impairment (Pl. Reply Br. 5-6). However, this argument fails textually, since the GAF scale refers to this score as only creating moderate problems and does not indicate these problems would be uncontrollable.

examining the record with the assistance of Dr. Cohen, the ALJ concluded that Plaintiff was not limited by and did not have severe mental impairments (R. 22). Because the finding by the ALJ is supported by substantial evidence in the record, this Court cannot reverse that decision[12].

2. The ALJ's conclusion that Plaintiff is capable of working in the national workforce under 20 C.F.R. § 404.1520(f) is supported by substantial evidence.

Using the sequential evaluation process[13], the ALJ concluded that Plaintiff was not disabled because he can hold and maintain jobs in the national workforce under 20 C.F.R. § 404.1520(f) (R. 22). The medical evidence provided by Plaintiff here substantially supports the ALJ's conclusion.

The ALJ found that Plaintiff had severe physical impairments including disc disease and diabetes mellitus (R. 22). While severe, the ALJ concluded these impairments did not meet or equal listings of disability because the diabetes was diet controlled and no organs were adversely affected and because Plaintiff's

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[12]It should also be noted that Plaintiff provided evidence for the first time at his hearing before the Appeals Council that bolsters his claim of mental impairment (Gov't. Br. 7). This Court, however, cannot look at testimony given for the first time at the Appeals Council. Matthews v. Apfel, 239 F.3d 589, 594 (3d Cir. 2001). This Court's decision rests on the evidence presented at the administrative hearing before the ALJ.

[13]The Social Security Regulations provide a five-step sequential evaluation to determine whether a claimant is disabled. 20 C.F.R. § 404.1520(b)-(f).

disc disease did not decrease his ability to ambulate (R. 22). Consequently, the ALJ found that Plaintiff cannot perform his past work experience (R. 22).

The ALJ then concluded that Plaintiff is able to perform sedentary jobs[14] (R. 23). This conclusion is substantially supported by the evidence. Dr. Thakarar concluded that Plaintiff could stand/walk three to four hours per day, sit eight hours per day, and lift up to twenty pounds frequently (R. 172). Plaintiff also admitted that even with back pain he could sit for two hours, walk two to six blocks without assistance, and stand for two hours (R. 166). The ALJ, acting more generously to Plaintiff's contentions than those of Dr. Thakarar, concluded that Plaintiff could occasionally lift ten pounds, frequently lift less than ten pounds, stand/walk for two hours per day, sit for six hours per day, and cannot crouch or crawl, though he can stoop (R. 22). In addition, the ALJ noted that while Plaintiff cannot perform his past work experience, he has retained some skills from his previous employment[15] (R. 23). The vocational expert testified that utilizing those preserved skills, Plaintiff

[14]Sedentary jobs are those that involve lifting no more than 10 pounds at a time and occasionally lifting items such as small tools, ledgers, or docket files. These jobs also require only occasional walking and standing and primarily involves sitting (R. 23).

[15]Those skills include Plaintiff's knowledge of computers, data entry, and knowledge of software (R. 23).

is able to hold any one of a number of jobs involving data entry or customer service (1,942,000 jobs nationally and 2,500 locally) (R. 23).

Plaintiff's mental capacities also justify the ALJ's finding that Plaintiff is able to hold and perform a sedentary job. Supra, p. 10 - 13. Based on these determinations of Plaintiff's mental and physical condition, the ALJ's finding that Plaintiff is not disabled because of his ability to remain active in the national workforce is substantially supported by the evidence.

3. The ALJ's finding that Plaintiff lacked credibility is supported by substantial evidence.

Once it is shown that medical evidence indicates a claimant suffers from impairments, an ALJ must determine whether those complaints are credible. 20 C.F.R. § 404.1529(c). All evidence must be regarded when making this evaluation. Id. The ALJ's determination must be supported by substantial evidence and is given great deference by reviewing courts. Walters v. Commissioner of Social Security, 127 F.3d 525, 531 (6th Cir. 1997).

Here, the ALJ was presented with inconsistent evidence. Dr. Thakarar found that Plaintiff was able to sit, walk, and stand multiple hours each day (R. 172). Plaintiff testified that taking Tylenol #3 helps his back pain (R. 21). The evidence concerning Plaintiff's mental impairments is also

contradictory[16]. Additionally, Plaintiff testified that he is able to function in society by performing the activities of daily living, including shopping, cooking, using public transportation, and housekeeping (R. 20). Reconciling the evidence and testimony presented, the ALJ concluded that Plaintiff's claims were not "totally credible" (R. 24). Because the evidence substantially supports the ALJ's conclusion, this Court must affirm the ALJ's finding.

[16]Supra, III, C, 1.

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v.	:	
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JO ANNE BARNHART,	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
	:	
Defendant.	:	NO. 02-8972

O R D E R

AND NOW, this day of July, 2003, upon consideration of the Parties' Cross Motions for Summary Judgment, it is hereby ORDERED that Plaintiff's Motion is DENIED, Defendant's Motion is GRANTED and judgment is entered in favor of the Defendant.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.